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Legal issues

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JURISPRUDENTIAL LEGERDEMAIN: DAMAGES FOR GRATUITOUS SERVICES AND ATTENDANT CARE*

The head of damages for gratuitous services and attendant care is a curious legal institution, often referred to as the *Griffiths v Kerkemeyer* head of damages. In Australia, under this head of damages, a wrongfully injured claimant can obtain compensation for the voluntary work of third parties (including the tortfeasor) who attend to the needs created by the injury. However, once the court calculates the monetary value of these gratuitous services and awards them, the claimant is under no legal obligation to reimburse the third party carers for their services.¹

In the past decade, damages for gratuitous care (or loss thereof) have comprised a substantial part of the quantum of damages, particularly, but not exclusively, in medical negligence cases. In 2001 in *Simpson v Diamond* [2001] NSWSC 925,² the case that provided the most immediate impetus for the torts reform of 2002-2003, the trial judge, Whealy J, awarded total damages of \$A14,202,042 to Calandre Simpson, who was born in 1979 and suffered cerebral palsy at birth as a result of admitted negligence of the attending medical practitioner. The quantum of damages included \$119,730 in *Griffiths v Kerkemeyer* damages for the care provided to Calandre by her mother in the past, and \$25,000 for the mother's care in the future. The Court of Appeal, in *Diamond v Simpson (No 1)* [2003] NSWCA 67 at [259], reduced the original quantum of damages to \$10,998,692. While damages for past gratuitous care were not challenged, the Court of Appeal reduced damages for future care to \$10,000 on the basis that once the professionals took over, Calandre's need for services provided by her mother would diminish. The Court of Appeal also disallowed (at [210]) Whealy J's holding that:

The Spastic Centre's unpaid invoices are recoverable as gratuitous services ... [they] fall on the side of the line more closely proximate to services provided by friends, relatives and members of the community generally.

The Court of Appeal determined that an extension of the doctrine to therapeutic services provided free of charge by a charitable organisation was an error of law, and observed (at [232]): "*Griffiths v Kerkemeyer* claims are anomalous and exceptional and courts should be reluctant to extend the *Griffiths v Kerkemeyer* approach to new categories of claims." However, the Court of Appeal's characterisation of the gratuitous care claims as "anomalous and exceptional" does not reflect the reality. They are now statutorily entrenched in all but one jurisdiction, and constitute a routine element of every personal injury claim. For instance, in *Woolworths Ltd v Lawlor* [2004] NSWCA 209, damages of \$126,453.60 (out of the total of \$219,536.60) were awarded for past and future domestic assistance provided to the plaintiff by her retired husband, despite the plaintiff's continuation in her employment.³

* The author wishes to thank Professor Harold Luntz for his invaluable comments and guidance, which have helped to make this Column a more accurate reflection of the law of gratuitous damages.

¹ *Kars v Kars* (1996) 187 CLR 354 at 372.

² For a detailed analysis of the case and damages awarded, see Luntz H, "Damages in Medical Litigation in New South Wales" (2005) 12 JLM 280.

³ Damages were awarded for past gratuitous services for 15 hours per week for the eight weeks immediately after the accident, nine hours per week for the next 94 weeks until the date of trial; for the future, the court allowed nine hours per week for a further two years and then seven hours per week for 24 years: *Woolworths Ltd v Lawlor* [2004] NSWCA 209 at [16]. See also *Kavanagh v Akhtar* (1998) 45 NSWLR 588, in which damages for gratuitous care were assessed at \$90,000 out of \$233,191.10.

In October 2002, the *Review of the Law of Negligence Report* (the Ipp Report),⁴ which became a foundation document for partial codification of the law of negligence and the law of damages, recommended⁵ that statutory thresholds be imposed for recovery of *Griffiths v Kerkemeyer* damages, and that the measure of damages be linked to average weekly earnings. It is therefore apposite to examine the jurisprudential basis and application of this species of compensatory damages.

Historical note

The concept of damages at common law has a long history. In early medieval England, damages were essentially meant to be an inducement to the wronged party to forgo the right to take revenge. In the later medieval period, perhaps by analogy with the sale of church indulgences, the courts would award damages “for the benefit of the wrongdoer’s soul rather than of the victim’s pocket”, on the basis that “the conscience of the wrongdoer must be purged by making restitution”.⁶ Eventually, in the first part of the 19th century, the judiciary crystallised the concept of compensatory damages in terms of putting the claimant into as good a position as if no wrong had occurred, measured by the loss he or she had suffered.⁷ Lord Blackburn in *Livingstone v Rawyards Coal Co* [1880] 5 AC 25 observed (at 39) that an award of a lump sum:

it is believed, so far as money can, will put the injured person in the same position as he or she would have been in if the wrong had not been committed.

This notion of the purpose of compensatory damages has been interpreted to mean that, in an action for damages for personal injuries, apart from general damages,⁸ plaintiffs could recover damages only where their disabilities had been or may be productive of financial loss in relation to loss of earning capacity.⁹ For Australia, the rule was articulated in 1956, when in *Blundell v Musgrave* (1956) 96 CLR 73 the High Court had to determine whether the tortfeasor should be liable for hospital and ambulance expenses stemming from the accident. The expenses had been charged by the employer (the Navy Department of the Commonwealth) to the injured claimant’s pay account, although the employer had a statutory discretion to waive them. The High Court held that the costs or value of the services in an action for damages for personal injuries could not be recovered unless the claimant could establish there was, or would be, a legal obligation to pay or refund them.¹⁰

In *Teubner v Humble* (1963) 108 CLR 491, Windeyer J discussed the need-based concept of compensation when he divided damages arising from personal injury into three categories (at 505):

Broadly speaking there are, it seems to me, three ways in which a personal injury can give rise to damage: First, it may destroy or diminish, permanently or for a time, an existing capacity, mental or physical: Secondly, it may create needs that would not otherwise exist: Thirdly, it may produce physical pain and suffering.

The case involved Mr Teubner, the plaintiff, who while on an assignment from his newspaper to photograph devastation caused by a violent storm in Adelaide on 12 May 1960, was crossing the road at around 11pm when he was hit by the defendant’s car on his left-hand side. Mr Teubner suffered

⁴ The *Review of the Law of Negligence Report* was written by an expert panel of eminent persons comprising the Hon Justice David Ipp (Chair), Professor Peter Cane, Dr Don Sheldon and Mr Ian Macintosh. The Panel was created on 2 July 2002 by the Commonwealth, State and Territory Governments to examine and review the law of negligence and its interaction with the *Trade Practices Act 1974* (Cth). The Second Report, released on 2 October 2002, includes the First Report (released on 2 September 2002), and is available at <http://www.revofneg.treasury.gov.au/content/reports.asp> viewed 9 March 2005.

⁵ The Ipp Report, n 4, Recommendation 51.

⁶ Williams G, ‘The Aims of the Law of Tort’ (1951) 137 *Current Legal Problems* 143.

⁷ *Robinson v Harman* (1848) 1 Exch 850 at 855.

⁸ The term “general damages” has different meanings in different contexts. Frequently, it refers to compensation for past and future “pain and suffering”, involving both physical pain as well as any psychiatric condition caused by the injury or emotional distress consequent upon the knowledge that the injury has caused a disability or disfigurement, and limitations imposed by the disability on future enjoyment of life.

⁹ *Graham v Baker* (1961) 106 CLR 340 at 347. In *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 166, Gibbs CJ adopted the *Graham v Barker* principle, stating: “In my opinion, in cases of this kind ... the plaintiff is entitled to damages only to the extent that the need thus created is or may be productive of financial loss.” Gibbs CJ, however, was in the minority on this point.

¹⁰ The full court agreed on this principle. McTiernan, Williams, Webb and Taylor JJ in a joint judgment found on the facts of the case that the legal obligation existed, whereas Dixon CJ and Fullagar J found that it did not.

very serious injuries requiring constant nursing attention (at 504).¹¹ Windeyer J described the kinds of needs created by the injury thus (at 506):

In most cases the most obvious of such needs are the cost of past and future medical and nursing attention, and of special equipment, crutches, a wheel chair and such like. But the list is not closed. Any requirement which arises as a consequence, and a not too remote consequence, of the injury, can I think be considered.

The court in *Teubner v Humble* assumed that, in accordance with the *Blundell v Musgrave* principle, the plaintiff would only be compensated for needs giving rise to financial loss, which but for the injury would not be incurred. This principle of calculating damages for services on the basis of past and future financial loss was jettisoned in *Griffiths v Kerkemeyer* (1977) 139 CLR 161, in which the plaintiff had been rendered a quadriplegic by the defendant's negligence. In issue was the question whether damages, including an amount for past and future nursing and other services provided gratuitously by the plaintiff's fiancée and family, were recoverable. The court reconceptualised the notion of compensation by adopting Windeyer J's idea that plaintiffs can recover damages for loss as manifested by the needs created by the wrongful injury, but extended it to cover a need for services provided on voluntary basis.

The concept of injured persons being paid because as a result of the accident, or for some other reason, they have certain financial needs is common to insurance law, statutory benefits systems and no-fault compensation schemes. In the private law context, the adoption of the concept of compensation based on the plaintiff's loss, as represented by her or his need,¹² provided a rationale for creating a new category of compensation for gratuitous care and attendance by relatives and friends.¹³ However, since it was really the third parties who suffered the loss through provision of the gratuitous services, but who, as a general rule,¹⁴ had no right to sue the claimant's injurer, it was unclear how to apply the new rule.

At the time, two decisions of the English Court of Appeal adopted different approaches to the issue of awarding gratuitous damages. One was *Cunningham v Harrison* [1973] QB 942, in which the Court of Appeal held that the injured husband was entitled to claim compensation for his wife's voluntary care and services, but he was to hold the money on trust to pay them over to her. Lord Denning MR (at 952) stated:

It seems to me that when a husband is grievously injured – and is entitled to damages – then it is only right and just that, if his wife renders services to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. It should not be necessary to draw up a legal agreement for them. On recovering such an amount, the husband should hold it on trust for her and pay it over to her. She cannot herself sue the wrongdoer ... but she has rendered services necessitated by the wrong-doing, and should be compensated for it. If she had given up paid work to look after him, he would clearly have been entitled to recover on her behalf because the family income would have dropped by so much.

A day after the *Cunningham* decision, a differently constituted Court of Appeal handed down the judgment in *Donnelly v Joyce* [1974] QB 454. This case involved a child, Christopher Stefan Donnelly, who sustained injuries to his right leg in a road accident caused by the defendant's negligence. He was in hospital for three months. Afterwards, Christopher's mother gave up her paid part-time job for two years in order to attend to his needs. These included taking Christopher to the hospital daily for two months, as well as special daily bathing and dressing of the injured leg. Although Christopher was under no obligation to repay his mother for her services, the child claimed damages for the mother's

¹¹ The injuries included partial paralysis, amputation of his left leg, as well as cognitive impairment. In 1961, he became an inmate of the Home for Incurables at Fullarton, Adelaide.

¹² *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 178.

¹³ The courts awarded damages for gratuitous services by third parties long before the articulation of the doctrine. For example, in *Roach v Yates* [1938] 1 KB 256 damages were awarded loss of wages foregone by the wife and sister-in-law of the injured plaintiff (they had to give up their paid employment to look after him).

¹⁴ At the time, husbands, but not wives, could sue in certain cases for loss of consortium or loss of services, and some family members could recover damages for nervous shock: see *Hambrook v Stokes Bros* [1925] 1 KB 141.

loss of earnings for six months. In his analysis of damages for voluntary care, Megaw LJ concluded (at 462):

The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant...

Hence it does not matter, so far as the defendant's liability to the plaintiff is concerned, whether the needs have been supplied by the plaintiff out of his own pocket or by a charitable contribution to him from some other person whom we shall call the "provider"; it does not matter, for that purpose, whether the plaintiff has a legal liability, absolute or conditional, to repay to the provider what he has received, because of the general law or of some private agreement between himself and the provider; it does not matter whether he has a moral obligation, however ascertained or defined, so to do.

In *Griffiths v Kerkemeyer* (1977) 139 CLR 161, the three Justices constituting the Bench, Gibbs CJ, Stephen and Mason JJ, followed the decision in *Donnelly v Joyce* [1974] QB 454, and held the plaintiff, whose physical condition – attributable to the accident – created a reasonable need for services, was entitled to recover the fair and reasonable cost of these services provided by a relative or friend, and "that the question whether the plaintiff is under a legal liability, or a moral obligation, to pay for the services is quite irrelevant" (at 163).¹⁵

In *Van Gervan v Fenton* (1992) 175 CLR 327 the severely injured plaintiff was cared for at home by his wife who, in 1985, gave up her employment as a nurse's aide to attend to her husband on a virtually full-time basis. The wife was then earning about \$15,000 net per year. In the husband's action for damages in the Supreme Court of Tasmania, Cox J assessed the value the wife's gratuitous services at \$277 per week (her former net wages less travelling expenses). The Full Court (Green CJ, Wright and Crawford JJ) upheld the trial judge's assessment; however, in the High Court, Mason CJ and Toohey and McHugh JJ held (at 331):

[T]he wages forgone by a care provider are not an appropriate criterion for determining the value of services provided gratuitously to an injured person. As a general rule, the market cost or value of those services is the fair and reasonable value of such services.¹⁶

The doctrine was further developed in *Kars v Kars* (1996) 187 CLR 354 where, as a result of the accident, the plaintiff suffered injuries to her back which left her with a permanent disability. Her need for help in performing everyday tasks was voluntarily provided by her mother, mother-in-law, neighbours and her tortfeasor-husband. The High Court decided that future voluntary services provided by her husband-tortfeasor and valued at \$61,500 were compensable because "[f]rom the plaintiff's point of view, the identity of the person who fulfils the need caused by the tort matters not" (at 380).

At common law, the quantum of damages for past and future gratuitous care is calculated by the value of services required, and is not measured by the actual cost to the plaintiff (which, by definition, is nil), but by reference to the market value of like services.¹⁷ Moreover, in *Grincelis v House* (2000) 210 CLR 321 the majority of the High Court determined that when assessing damages for past gratuitous services, the court should add interest at commercial rates "to take account of inflation". In separate dissenting judgments, Kirby and Callinan JJ pointed out the incongruity and artificiality of this approach. Kirby J wrote (at [29]-[30]):

[G]iven that the very essence of the entitlement is that the services in question have been provided gratuitously; that the services are not usually donated for reasons of profit-making; that the amount recovered by the plaintiff is not legally repayable to those who provided the services; and that nobody has actually been out of pocket in money terms at all... To add interest upon a sum of money so derived takes logic almost to snapping point. It requires an extension of presuppositions that oblige a court, asked to adopt this course, to pause and ask where logic, in the form of "basic legal principles", has taken the law.

¹⁵ See also *Nguyen v Nguyen* (1990) 169 CLR 245 at 262; *Van Gervan v Fenton* (1992) 175 CLR 327 at 331-333, 338.

¹⁶ The approximate market rate applicable at the time was \$549 per week (at 339).

¹⁷ *Van Gervan v Fenton* (1992) 175 CLR 327.

Both the conceptual basis and the practical operation of the doctrine of damages for gratuitous care have been criticised. The year after the decision in *Griffiths v Kerkemeyer*, the Scottish Law Commission in its report on *Damages for Personal Injuries*,¹⁸ observed in relation to Megaw LJ's statements in *Donnelly v Joyce*:

In cases where services have been rendered gratuitously to an injured person, it is artificial to regard that person as having suffered a net loss in the events which happened. The loss is in fact sustained by the person rendering the services, a point vividly illustrated in cases where he has lost earnings in the course of rendering those services. We suggest, therefore, that it is wrong in principle, in cases where services have been rendered gratuitously by another to an injured person, to regard the latter as having in fact suffered a net loss.

In 1986 Tasmania abolished *Griffiths v Kerkemeyer* awards for gratuitous services by enacting the *Common Law (Miscellaneous Actions) Act 1986* (Tas), s 5, which states:

An award of damages that relates to personal injury of a person shall not include compensation for the value of services of a domestic nature or services relating to nursing and attendance –

- (a) which have been or are to be provided by another person to the person in whose favour the award is made; and
- (b) for which the person in whose favour the award is made has not paid or is not liable to pay.

In relation to Tasmania, however, Professor Harold Luntz,¹⁹ has drawn attention to the fact that, at the time, nearly all claims in Tasmania would have concerned injuries caused by motor accidents. Since the Tasmanian Motor Accidents Insurance Board was providing for these needs under the no-fault scheme, *Griffiths v Kerkemeyer* damages could be safely abolished.

In England, the House of Lords disapproved of *Donnelly v Joyce* in *Hunt v Severs* [1994] 2 AC 350, a case which involved a similar claim to that in *Kars*, whereby gratuitous services were provided to the claimant by her tortfeasor-partner.²⁰ Lord Bridge of Harwich, who delivered the leading judgment in *Hunt*, preferred (at 361) the reasoning of Lord Denning in *Cunningham v Harrison* to that of Megaw LJ in *Donnelly v Joyce*:

With respect, I do not find this reasoning convincing. I accept that the basis of a plaintiff's claim for damages may consist in his need for services but I cannot accept that the question from what source that need has been met is irrelevant. If an injured plaintiff is treated in hospital as a private patient he is entitled to recover the cost of that treatment. But if he receives free treatment under the National Health Service, his need has been met without cost to him and he cannot claim the cost of the treatment from the tortfeasor. So it cannot, I think, be right to say that in all cases the plaintiff's loss is "for the purpose of damages ... the proper and reasonable cost of supplying [his] needs."

The House of Lords determined that injured plaintiffs who recover damages for gratuitous services should hold them on trust for the voluntary carer. Furthermore, the plaintiff is not entitled to recover damages in respect of those services rendered by the defendant-tortfeasor herself or himself. This is because, once there is a duty to hold the money in trust for the voluntary carer, it makes no sense to require the tortfeasor to pay to the plaintiff a sum of money in respect of the services that the tortfeasor has rendered, and which the plaintiff must then repay to the tortfeasor.

In *Kars v Kars* (1996) 187 CLR 354 at 372, Toohey, McHugh, Gummow and Kirby JJ expressly rejected the *Hunt v Severs* approach, and reaffirmed the doctrine in *Griffiths v Kerkemeyer* formulated by Stephen J,²¹ for the following reason:

This conclusion [that the claimant has no moral or legal obligation to reimburse altruistic carers for their services] is now too deeply entrenched in this part of the law in Australia for this Court to reopen

¹⁸ Scottish Law Commission, *Damages for Personal Injuries: 1. Admissibility of Claims for Services and 2. Admissible Deductions*, Report No 51 (1978) at [22].

¹⁹ Personal communication, 28 March 2005.

²⁰ Plaintiff's damages included an award of £17,000 for past gratuitous services rendered by the defendant and £60,000 for future voluntary care.

²¹ "[T]he plaintiff should, I think, be regarded as beneficially entitled to the judgment he obtains without question of the imposition of any trust in respect of some part of his damages in favour of one who has rendered, or may in the future render, gratuitous services to him": *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 177.

it. It is an accepted principle in Australia that the damages for past and future gratuitous services constitute a sum designed to provide for the injured plaintiff's established needs. That sum may be calculated by reference to what the provider does and even what the commercial costs of doing it would entail. But the focus is upon the plaintiff's needs. The plaintiff might, or might not, reimburse the provider. According to the repeated authority of this Court, contractual or other legal liability apart, whether the plaintiff actually reimburses the provider is entirely a matter between the injured plaintiff and the provider.

Subsequently, in *Grincelis v House* (2000) 201 CLR 321,²² Kirby J changed his mind on the jurisprudential merits of the *Griffiths v Kerkemeyer* doctrine, stating (in dissent at [25]):

Having, in *Griffiths v Kerkemeyer*, embraced the principle that an injured plaintiff is entitled to recover damages for his or her needs met by the provision of gratuitous services by family or friends, this Court was set upon a path that has repeatedly demonstrated the "anomalies", "artificiality" and even "absurdities" of the "novel legal doctrine" which it adopted in substitution for its own earlier stated opinion.²³

The *Grincelis v House* majority (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), however, while noting "judicial dissatisfaction with the principle adopted in *Griffiths v Kerkemeyer*", quoted Kirby J's own words in *Kars v Kars* back and reiterated (at [19]):

What was decided in *Griffiths v Kerkemeyer* is "too deeply entrenched in this part of the law in Australia for this Court to reopen it".

Indemnity insurance

One of the major reasons for the generous approach to the *Griffiths v Kerkemeyer* awards is the inconsistency between the articulated legal fiction that damages are paid out of the defendant's pocket, and an unarticulated cognisance of the fact that in great majority of cases damages are paid by the insurer.²⁴ In *Kars v Kars* (1996) 187 CLR 354, the High Court suggested (at 381-382) that "a review of the relevance of insurance to the development of the common law liability in tort may indeed be timely",²⁵ but never seriously followed it up. When in *Dimond v Lovell* (decided in May 2000 and reported at [2002] 1 AC 384) the House of Lords again criticised Megaw LJ's judgment in *Donnelly v Joyce*, Lord Hoffmann pointed out (at 399) that the assumption

that damages will be paid by "the wrongdoer" out of his own pocket is not in accordance with reality. The truth is that virtually all compensation is paid directly out of public or insurance funds and that through these channels the burden of compensation is spread across the whole community through an intricate series of economic links. Often, therefore, the sources of "third party benefits" will not in reality be third parties at all. Their cost will also be borne by the community through taxation or increased prices for goods and services.

The realisation that the cost of damages awarded in tort cases is borne by the whole community was the core element of the Australian torts reform initiative.²⁶

Tort reform

In enacting reforms to damages for gratuitous services, the Commonwealth²⁷ New South Wales,²⁸ Victoria,²⁹ the Northern Territory³⁰ and, partly, Queensland³¹ followed the Ipp Report's

²² See also Callinan J (in dissent) in the same case at [45]-[58].

²³ His Honour was referring to *Blundell v Musgrave* (1956) 96 CLR 73.

²⁴ For example, in *Hunt v Severs* [1994] 2 AC 350, Lord Bridge declared (at 462): "At common law, the circumstance that a defendant is contractually indemnified by a third party against a particular legal liability can have no relevance whatsoever to the measure of that liability."

²⁵ Toohey, McHugh, Gummow and Kirby JJ. For a discussion of this issue see Mendelson D, "Plaintiffs' Needs, Insured Defendants and Assessment of Damages" (1997) 4 JLM 307.

²⁶ Ipp Report, n 4, at [3.4] and [3.5]; see also New South Wales Legislative Assembly, *Hansard*, 23 October 2002, p 22. See also Luntz H, "The Collateral Source Rule Thirty Years On" in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Clarendon Press, 1998) p 377.

²⁷ *Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004* (Cth), s 87W.

²⁸ *Civil Liability Act 2002* (NSW), s 15.

²⁹ *Wrongs Act 1958* (Vic), s 28IA. Victoria also has special statutory heads of damages for loss of gratuitous care (s 19A) and loss of capacity to provide care for others (s 28ID).

Recommendation 51.³² The Ipp guidelines were essentially based on a model, which was originally developed in the context of motor accident claims, first through amendments to the *Motor Vehicles (Third Party Insurance) Act 1942* (NSW), then continued in the *Motor Accidents Act 1988* (NSW) and the *Motor Accidents Compensation Act 1999* (NSW).³³ Western Australia³⁴ and South Australia³⁵ developed their own codes; however, these do not differ greatly from the majority's approach. In Tasmania awards for gratuitous services have been abolished (see above). While the Australian Capital Territory is governed by common law in relation to awards of damages for gratuitous care provided to the plaintiff, by virtue of the *Civil Law (Wrongs) Act 2002* (ACT), s 100(2)(d), the plaintiff can recover damages for loss of capacity to perform domestic gratuitous services that he or she previously rendered, or might have been reasonably expected to render to others.³⁶

The Commonwealth, New South Wales, Victoria, Northern Territory and Queensland stipulate that damages for gratuitous services³⁷ are not to be awarded:

- unless “the services are necessary”;³⁸ or “there is (or was) a reasonable need for the services to be provided”;³⁹ and
- unless the need for the services arose solely out of the injury in relation to which damages are awarded;⁴⁰ and
- if the services are provided, or are to be provided for less than six hours per week, and for less than 6 months.⁴¹

As a general rule, under the Commonwealth trade practices legislation, in New South Wales, Victoria, the Northern Territory and Western Australia, damages for gratuitous services are subject to a maximum of 40 hours a week and a maximum hourly rate of 1/40th of average weekly earnings in the relevant jurisdiction.⁴² Western Australia excludes any services that would have been provided in any event, and has a monetary threshold of \$5,000 (adjusted on annual inflation basis) with calculation of damages over the monetary threshold tied to weekly earnings.⁴³ The provision governing damages in respect of gratuitous services is ambiguous. Under the *Civil Liability Act 1936* (SA), s 58 (1):

³⁰ *Personal Injuries Act 2003* (NT), ss 18, 23.

³¹ *Civil Liability Act 2003* (Qld), s 59.

³² Ipp Report, n 4.

³³ Professor Harold Luntz, personal communication, 28 March 2005.

³⁴ *Civil Liability Act 2002* (WA), ss 12, 13.

³⁵ *Civil Liability Act 1936* (SA), s 58.

³⁶ At common law, this head of damages was first recognised by the New South Wales Court of Appeal in *Sullivan v Gordon* (1999) 47 NSWLR 319, which determined that common law damages for loss of capacity to care for others were recoverable. See also *Weinert v Schmidt* (2002) 84 SASR 307, and *CSR Ltd v Thompson* [2003] NSWCA 329 which is at present under appeal to the High Court on this point.

³⁷ In some jurisdictions gratuitous services are defined as “attendant care services”, which refer to “(a) services of a domestic nature; (b) services relating to nursing; (c) services that aim to alleviate the consequences of an injury.” See eg the *Civil Liability Act 2002* (NSW), s 15(1).

³⁸ *Civil Liability Act 2003* (Qld), s 59(1)(a). Section 59(4) also provides that “In assessing damages for gratuitous services, a court must take into account – (a) any offsetting benefit the service provider obtains through providing the services; and (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution.”

³⁹ *Civil Liability Act 2002* (NSW), s 15(2)(a); *Personal Injuries Act 2003* (NT), s 23(1)(a); *Wrongs Act 1958* (Vic), s 28IA(1)(a); *Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004* (Cth), s 87W(2)(a).

⁴⁰ *Civil Liability Act 2003* (Qld), s 59(1)(b); *Civil Liability Act 2002* (NSW), s 15(2)(b); *Personal Injuries Act 2003* (NT), s 23(1)(b); *Wrongs Act 1958* (Vic), s 28IA(1)(b); *Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004* (Cth), s 87W(2)(b).

⁴¹ *Civil Liability Act 2003* (Qld), s 59(1)(c); *Civil Liability Act 2002* (NSW), s 15(2)(c); *Personal Injuries Act 2003* (NT), s 23(2); *Wrongs Act 1958* (Vic), s 28IA(2); *Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004* (Cth), s 87W(2)(d) and (e).

⁴² *Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004* (Cth), s 87W(3); *Civil Liability Act 2002* (NSW), s 15(4); *Wrongs Act 1958* (Vic), s 28IB; *Personal Injuries Act 2003* (NT), s 23; *Civil Liability Act 2002* (WA), ss 12(5), (6) and (7).

⁴³ *Civil Liability Act 2002* (WA), ss 12(3), 13(1).

[D]amages are not to be awarded

- (a) to allow for the recompense of gratuitous services except services of a parent, spouse or child of the injured person; or
- (b) to allow for the reimbursement of expenses, other than reasonable out-of-pocket expenses, voluntarily incurred, or to be voluntarily incurred, by a person rendering gratuitous services to the injured person.

This suggests that persons other than “a parent, spouse or child” can only recover “reasonable out-of-pocket expenses”, though the legislation does not provide any thresholds or limits upon such expenses. In relation to “a parent, spouse or child of the injured person”, there is no mention of out-of-pocket expenses; however, the cap of four times average weekly earnings is set for gratuitous service,⁴⁴ though the court may award damages in excess of this limit.⁴⁵

Interpretation of statutory provisions

Close reading of the very complex damages provisions will, in due course, undoubtedly generate many challenges relating to the interpretation of particular words and phrases as well as legal standards governing the new statutory compensation regimes.

For example, in *Woolworths Ltd v Lawlor* [2004] NSWCA 209, the court was invited to interpret s 15(2)(b) of the *Civil Liability Act 2002* (NSW), which provides:

No damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that: ...

- (b) the need has arisen (or arose) solely because of the injury to which the damages relate.

Using a hypothetical example of a claimant with a pre-existing condition who required assistance of five hours per week before the accident, and 15 hours of post-accident gratuitous care, Beazley JA (Hodgson and Tobias JJA concurring), interpreted s 15(2)(b) as allowing for an award of 10 hours for gratuitous attendant care services because the need for those 10 hours had arisen “solely because of the injury to which the damages relate” (at [28]).⁴⁶ In coming to this conclusion, Beazley JA, having noted that that such construction did “not do any violence to the express words of the section”, discussed (at [29]) the operation of s 15(2)(b) if the word “substantially” were substituted for the word “solely”:

[T]hen the section would have directed the Court to make an assessment whether the need for the services arose substantially or mainly because of the injury. If the need arose substantially because of the injury a plaintiff would be entitled to an award notwithstanding that portion of the need was attributable to some other cause. So in the example given in the previous paragraph, a plaintiff would be entitled to an award for 15 hours of attendant services, not 10.

Her Honour effectively adopted the approach of Deane and Dawson JJ in *Van Gervan v Fenton* (1992) 175 CLR 327 at 350, who in their dissenting judgment canvassed the argument that, in assessing the value of gratuitous services, “it is proper to have regard to the fact that where the services are provided by gratuitous carers in their own home, to the extent that they were providing some domestic services before the plaintiff suffered the injury, the need for which the plaintiff should be compensated relates only to those services that were not previously provided by the carer.” Indeed, the provision directs the court to make a comparison between the post-accident circumstances and the pre-accident situation. The causes for such care may vary. They could include a claimant’s innate lack of physical dexterity, lack of interest in domestic matters, laziness or, as in *Woolworths Ltd v Lawlor*, the fact that the claimant continued in full-time employment after her husband had retired from work. Unless the court inquires why, what kind of, and for how long gratuitous services were provided to

⁴⁴ *Civil Liability Act 1936* (SA) s 58(2).

⁴⁵ Under the *Civil Liability Act 1936* (SA) s 58(3), if the court is satisfied that: “(a) the gratuitous services are reasonably required by the injured person; and (b) it would be necessary, if the services were not provided gratuitously by a parent, spouse or child of the injured person to engage another person to provide the services for remuneration.” In that event, the damages awarded are not to reflect a rate of remuneration for the person providing the services in excess of State average weekly earnings.

⁴⁶ Somewhat puzzlingly, Beazley JA added: “This construction derives directly from the definition of ‘injury’ which includes ‘impairment of a person’s physical or mental condition’.”

the claimant before the accident, and then clearly delineates them in pre- and post-accident terms, the court will be effectively substituting the adverb “substantially” for “solely” when calculating damages for gratuitous care. It also would be helpful to develop a definition of “need” for the purposes of gratuitous services or devise a legal test for assessing it. Statutory thresholds merely measure its “quantity” in terms of hours, to be translated into hourly or weekly rates.

Interface between damages for gratuitous care and compensation for pure psychiatric injury (pure mental harm)

Finally, the major policy consideration underlying the concept of compensation for gratuitous care is the acknowledgment – in a rather peculiar and indirect way – of loss, sometimes hardship, experienced by family members and friends who deal on a day-to-day basis with the demands of caring for someone who has suffered an injury. When this head of damages was created in the 1970s, the law, with some notable statutory exceptions,⁴⁷ was still virtually in total denial of the fact that an injury to, or death of, a person can have devastating psychological consequences for those with whom he or she was in a loving relationship. Since then, the High Court in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317,⁴⁸ followed by *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33, enunciated that the determining factor of recovery for “pure mental harm” is reasonable foreseeability of psychiatric injury.⁴⁹ Hence, defendants’ liability for “pure mental harm”⁵⁰ should be “the closeness and affection of the relationship” between the person injured or killed by the defendant and her or his close relatives. McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd* (at [51]) expressed the rule in the following terms:

The test is, would a reasonable person in the defendant’s position, who knew or ought to know of that particular relationship, consider that the third party was so closely and directly affected by the conduct that it was reasonable to have that person in contemplation as being affected by that conduct?

In general, all Australian States and Territories allow recovery for pure mental harm in the form of a recognised psychiatric illness if the claimant is a close member of the family of a person killed, injured or endangered in the accident.⁵¹ This means that, once found liable, a defendant who has wrongfully injured or killed one person can face separate actions by several claimants arising out of the same wrong.⁵² The defendant will have to pay damages that include compensation for gratuitous services provided to the plaintiff by close relatives. If the gratuitous carers for whose services the injured person has been compensated are also close relatives who have suffered a foreseeable psychiatric injury as a result of the wrongful injury to the plaintiff, the relatives may have an independent action in negligence for mental harm against the defendant.

For example, in *Masri v Marinko* [1998] NSWSC 467, Mrs Masri suffered catastrophic brain damage while undergoing an abortion. Through her next friend, she sued in negligence the medical practitioner who performed the abortion. She was awarded \$3.7 million in damages, which included \$317,200 for past gratuitous services by her husband, Mr Masri, and \$2,726,850 for future care and management.

⁴⁷ *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 4; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), Pt VII, ss 23, 24 and 25; *Law Reform (Miscellaneous Provisions) Act 1955* (ACT), Pt VII, ss 23, 24 and 25; *Civil Liability Act 1936* (SA), ss 28 and 29; *Compensation (Fatal Injuries) Act 1974* (NT), s 10.

⁴⁸ The *Tame* and *Annetts* cases were heard together.

⁴⁹ The term “mental harm” has been defined as “impairment of a person’s mental condition”: see *Civil Liability Act 2002* (NSW), s 27. However, both at common law and under statute, damages are not available for conditions other than “recognised psychiatric illness”.

⁵⁰ The action for variously called “pure psychiatric injury”, “pure nervous shock” or “pure mental harm” refers to liability for negligently inflicted psychiatric illness that does not arise from a physical injury to the claimant.

⁵¹ *Civil Liability Act 1936* (SA), s 53; *Civil Liability Act 2002* (Tas), s 32(2)(b); *Wrongs Act 1958* (Vic), s 73(2): “a close relationship with the victim”; **Error! Reference source not found.** (ACT), s 36; *Civil Liability Act 2002* (NSW), s 30(2)(b); *Law Reform (Miscellaneous Provisions) Act 1956* (NT), s 24(1) is to be interpreted according to common law; *Civil Liability Act 2002* (WA), s 5Q, reflects the common law; Queensland is governed by the common law.

⁵² Under the survival of actions rule, the estate of the deceased plaintiff may proceed with a cause of action the deceased would have had against the defendant, if she or he had lived; and the dependants may sue the defendant under the wrongful death action to recover damages for the foreseeable loss they suffered that as a result of the victim’s death.

Mr Masri gave up his job to look after his wife but, at the time, refused to apply to the administrator of his wife's fund for payment for his services. He sued Dr Marinko for negligently occasioned pure psychiatric injury (nervous shock) in the form of "pathological grief". This phrase sometimes used to describe an emotional reaction to bereavement, which is considered more marked than an uncomplicated bereavement; however neither "pathological grief" nor uncomplicated bereavement meet the diagnostic criteria for any diagnosable mental disorder.⁵³ Mr Masri's pathological grief did not present as a Major Depressive Disorder⁵⁴ but manifested itself in an obsessional insistence on performing voluntary services for his injured wife. Rolfe J assessed Mr Masri's damages at \$455,170, comprising \$93,335 for general damages including interest, \$299,998 for past wage loss including interest, and \$61,837 for lost earning capacity. Although the New South Wales Court of Appeal⁵⁵ in *Marinko v Masri* [1999] NSWCA 364 reduced the quantum for general damages and damages for past wages, it affirmed Rolfe J's reasoning that Mr Masri's entitlement to recover his loss of wages flowed from the psychiatric injury *he* suffered in consequence of the defendant's tortious conduct, and as such was *independent* of Mrs Masri's right to recover for her relevant loss. Handley JA (with whom Priestley JA and Sheppard AJA agreed) stated (at [32]):

The two claims [Mrs Masri's and Mr Masri's] are separate and distinct, and there is no necessary overlap. The position would have been different if the husband had not been disabled, but gave up paid employment to look after the wife where there would be only one cause of action. In this case there are two causes of action and two losses and I have not been persuaded that there is any double dipping or overlap in the two awards.

The question whether damages for loss of capacity to provide gratuitous care, known as *Sullivan v Gordon* damages⁵⁶, are recoverable in law, will be considered by the High Court in *CSR Ltd v Thompson*.⁵⁷ Should the High Court hold that they are recoverable, then if Mrs Masri also had children, the defendant would have to pay damages for her inability to provide gratuitous care for her children, and they in turn would have an independent action against the defendant for pure psychiatric disorder occasioned by their mother's injury.⁵⁸ Moreover, since it is the plaintiff, not her or his carers, who receives common law compensation for the need for gratuitous care, the carers may be able to obtain statutory carers' benefits.

Conclusion

The law should acknowledge that wrongful injury or death constitutes an infringement of the interest in unimpaired family relations. Those in a loving relationship with the injured or killed person often suffer intense emotional distress, which sometimes can lead to a diagnosable psychiatric disorder. In many instances, wrongfully inflicted injury or death of a loved person also occasions economic loss to his or her relatives. However, the present system of awarding plaintiffs (or their estates)⁵⁹ damages for gratuitous care by reference to the carer's loss but leaving it to the plaintiff (or the estate administrator) to determine whether or not to hand over the money to the altruistic carer is absurd. Moreover, the assessment of damages - which tend to involve tens of thousand of dollars - is impressionistic. For, as Windeyer J observed in *Teubner v Humble* (1963) 108 CLR 491 at 507:

⁵³ Volkan V, "Typical Findings in Pathological Grief" (1970) 44 *Psychiatric Quarterly* 231-50; Zisook S & DeVaul R, "Unresolved Grief" (1985) 45 *The American Journal of Psychoanalysis* 370-79; Zisook S & Shuchter SR, "Time Course of Spousal Bereavement" (1985) 7 *General Hospital Psychiatry* 95-100; Engel GL, "Is Grief a Disease?" (1961) 23(1) *Psychosomatic Medicine* 18-22; Maddison D & Raphael B, "Normal Bereavement as an Illness Requiring Care: Psychopharmacological Approaches" (1972) 2 *Journal of Pharmacology* 785-98.

⁵⁴ Bloch S & Singh BS (Eds), *Foundations of Clinical Psychiatry* 2nd ed Melbourne: Melbourne University Press 2001 at 178-79; see also: DSM IV TR, Additional Conditions that may Be a Focus of Clinical Attention (Not Mental Disorders): "V62.82 Bereavement" Washington DC: American Psychiatric Association 2000 at 740;

⁵⁶ *Sullivan v Gordon* (1999) 47 NSWLR 319; [1999] NSWCA 338.

⁵⁷ *High Court of Australia Bulletin*, No 2 (2005) (as at 24 March 2005): see <http://www.austlii.edu.au/au/other/hca/bulletin/hcab0502.html> viewed 28 March 2005.

⁵⁸ *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; *Cubbon, Cubbon & Bates v Roads and Traffic Authority (NSW)* [2004] NSWCA 326.

⁵⁹ Subject to statutory thresholds and caps, damages for the value of voluntary services for the period between injury and death are generally available.

The main difficulty in assessing damages for needs created is in the impossibility of surely predicting the future.

The principled approach would be to either create a discrete cause of action for voluntary carers with defined elements and appropriate legal standards, or to provide special statutory benefits for them at either commercial rates or in conformity with average weekly wages. However, given that the *Griffiths v Kerkemeyer* head of damages is now codified, it will probably take another professional indemnity crisis before this issue is addressed.

More fundamentally, once the common law of negligence has reconceptualised itself in terms of a need-based compensation institution, the question arises why should the community – through its legal system – discriminate against the carers of injured persons who have the same needs but are unable to prove fault? There are valid economic, equitable, compassionate and transparency reasons for jettisoning the common law tort of negligence relating to personal injury, in favour of a national no-fault insurance scheme for injured persons who are in need of long-term care and attendance.⁶⁰

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⁶⁰ Luntz H, “The Case for No-fault Accident Compensation” (1985) 15 Q Law Soc J 161; Luntz H, “Reform of the Law of Negligence: Wrong Questions – Wrong Answers” (2002) 25 UNSWLJ 836; Luntz H, “Guest Editorial: Medical Indemnity and Tort Law Reform” (2003) 10 JLM 385.